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**REMARKS**

This Amendment is in response to the Office Action mailed 10/31/2003. In the Office Action, claims 1-91 were rejected under 35 U.S.C. § 112; claims 1-3, 6-16, 19, 20, 22-55 and 70-91 were rejected under 35 U.S.C. § 102(b or e); and claims 4-5, 17-18, 21 and 56-69 were indicated as being allowable over the prior art.

Reexamination and reconsideration in view of the amendments and the remarks made herein is respectfully requested.

Applicant has amended claims 1, 4-7, 12-15, 17-21, 23-30, 33, 35, 40, 43-44, 54-57, 63, 70, and 84-85 by this response. Applicant has cancelled claims 2-3, 10, 16, 31-32, 34, 39, 41-42 and 45-46 without prejudice. Applicant has added new dependent claims 92-109. Accordingly, claims 1, 4-9, 11-15, 17-30, 33, 35-38, 40, 43-44, and 47-109 are now pending. Of claims pending, claims 1, 4-5, 17-18, 21, 23, 33, 40, 55-56, 63, 70, and 84 are independent claims.

Applicant believes that no new matter has been added by this response.

**I) Claim objections - Dependency**

In Section 5 of the Office Action, dependent claims 4-5, 17-18, and 21 were objected to but indicated as being allowable if rewritten into independent form.

Applicant has amended claims 4, 5, 17, 18, and 21 into independent form including limitations from the rejected base claims and any intervening claims.

Applicant believes the amendments to claims 4-5, 17-18, and 21 places them in condition for allowance and now make this objection moot. Applicant respectfully requests the withdrawal of

this objection to claims 4-5, 17-18, and 21.

II) Claim Rejections Under 35 U.S.C. § 112, second paragraph

In Section 2 of the Office Action, claims 1-91 were rejected to under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. [Office Action, page 2, paragraph 2]. Applicant respectfully traverses this rejection.

The Office Action particularly called out claims 8, 9, 12, 19, and 20 as being indefinite.

Regarding claim 12, the Office Action indicated that it was indefinite in that it called into question whether the applicant's intention is to claim the combination of chocolate with a chocolate dispenser or only the subcombination of the chocolate dispenser. Applicant has amended claim 12 as well as claims 13-15 to indicate that the combination of chocolate with a chocolate dispenser is being claimed.

Regarding claims 19-20, the Office Action indicated that these claims were indefinite because they lacked proper antecedent basis for the phrase "the handle". Applicant has amended the dependency of claims 19-20 from "claim 12" to --claim 18-- to correct this mistake.

Regarding claims 8 and 9, the Office Action indicated that these claims were indefinite because they appear to be entirely functional and do not appear to add a single structural element to the claims from which they depend. Applicant respectfully disagrees.

Functional limitations are not inherently wrong in apparatus

claims. "A functional limitation is an attempt to define something by what it does, rather than by what it is (e.g., as evidenced by its specific structure or specific ingredients). There is nothing inherently wrong with defining some part of an invention in functional terms. Functional language does not, in and of itself, render a claim improper. In re Swinehart ,439 F.2d 210,169 USPQ 226 (CCPA 1971). A functional limitation must be evaluated and considered, just like any other limitation of the claim, for what it fairly conveys to a person of ordinary skill in the pertinent art in the context in which it is used. A functional limitation is often used in association with an element, ingredient, or step of a process to define a particular capability or purpose that is served by the recited element, ingredient or step. Whether or not the functional limitation complies with 35 U.S.C.112, second paragraph is a different issue from whether the limitation is properly supported under 35 U.S.C.112, first paragraph or is distinguished over the prior art. [MPEP § 2173.05(g), 8<sup>th</sup> Edition, Rev. 1, Feb. 2003, Page 2100-206].

Moreover, Applicant respectfully submits that claims 8 and 9 do provide additional structural limitations to the claims. Claim 8 recites the additional limitation of "the heater to heat the chamber up to a temperature of one hundred and five degrees Fahrenheit". [Claim 8, lines 3-4]. In this case, the structure of the heater must be sufficient to heat the chamber up to a temperature of substantially one hundred and five degrees Fahrenheit in order to heat chocolate and not some other material, such as plastic. Claim 9 recites the additional limitation of "the heater to heat the chamber over a temperature range of eighty six to one hundred and twenty degrees Fahrenheit". [Claim 9, lines 3-5]. In this case, the structure of the heater must be

sufficient to heat the chamber within a given temperature range in order to melt various types of chocolate and not some other material, such as plastic.

If the heater is of insufficient capacity, it may not melt chocolate into a liquid state and the dispenser would not function properly. On the other hand, if the heater has too much heating capacity and heats the chamber to excessive temperatures, it may burn the chocolate and the dispenser also would not function properly.

For the foregoing reasons, Applicant respectfully requests the withdrawal of the 35 U.S.C. § 112, second paragraph rejection of claims 1-91.

### III) American Inventors Protection Act of 1999 ("AIPA")

In Section 3 of the Office Action, it is stated that the American Inventors Protection Act of 1999 ("AIPA") and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Applicant notes that none of references cited by the Office Action are the result of an international application.

This patent application was filed on January 09, 2002, after AIPA's effective date of November 29, 2000. While 35 USC 102(e) prior to the amendment by the AIPA was cited in Section 3 of the Office Action, Applicant understands that 35 USC 102(e) as amended by the AIPA has been used in the examination of this patent application.

IV) Claim Rejections Under 35 U.S.C. § 102(b) and (e)

Claims 1-3, 6-16, 19, 20, 22-55 and 70-91 were rejected under 35 U.S.C. § 102(b or e) as being anticipated by U.S. Patent 6,460,736 issued to D'Agostino (D'Agostino); or U.S. Patent 4,265,618 issued to Herskovitz, et al. (Herskovitz); or U.S. Patent 5,026,187 issued to Belanger, et al. (Belanger). [Office Action, page 3, Section 4]. Applicant respectfully traverses this rejection.

"To anticipate a claim, the reference must teach every element of the claim. 'A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.' *Verdegaal Bros. V. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). ... 'The identical invention must be shown in as complete detail as is contained in the claim.' *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989)." [MPEP § 2131, 8<sup>th</sup> Edition, Rev. 1, Feb. 2003, Pg. 2100-701].

Applicant has amended independent claims 1, 23, 33, 40, and 55 to clarify Applicant's claimed invention. The limitations of cancelled claims 3, 10, and 16 have been added into independent claim 1 to clarify Applicant's claimed invention. Claim 1 was further amended to clarify the introduction of a first end and a second end of the chamber. The limitations of cancelled claims 31-32 have been added into independent claim 23 with a corrected temperature range in order to clarify Applicant's claimed invention. Claim 23 was further amended to replace "evacuating" with --dispensing-- to clarify the invention and be more consistent with the dependent claims, as well as add the word --

liquid-- to correct an antecedent basis for the phrase "liquid chocolate". The limitations of cancelled claim 34 has been added into independent claim 33 in order to clarify Applicant's claimed invention. Claim 33 was further amended to add an element of position of the portable chocolate dispenser to further clarify Applicant's claimed invention. Claim 33 was still further amended to clarify Applicant's claimed invention in that the pressure is to be applied to liquid chocolate to force it out over the dispensing area. The limitations of unamended claim 43 and cancelled claims 45-46 have been added into independent claim 40 to clarify Applicant's claimed invention. Claim 55 was amended to clarify differences between solid chocolate and liquid chocolate in order to clarify Applicant's claimed invention. Claim 55 was further amended to clarify aspects of the plunger including adding a handle at a first end so that manual pressure may be applied to liquid chocolate in the chamber. An introduction of the first end and the second end of the chamber was also clarified by the amendments made to claim 55.

Claims 2-3, 10, 16, 31-32, 34, 39, 41-42 and 45-46 have been cancelled such that the rejections of these dependent claims is now believed to be moot.

The Office Action alleges that Herskovitz and Belanger "teach structures on which the claimed products read including chamber, heater, nozzle and plunger. Accordingly the devices of these references are considered to be inherently capable of use with chocolate, as functionally recited [in] the claims." [Office Action, page 3, section 4, lines 5-8]. Applicant respectfully disagrees.

The Office Action alleges that D'Agostino "meets the structural limitations of the claims in addition to showing use

with chocolate." [Office Action, page 3, section 4, lines 8-9]. Applicant respectfully disagrees.

Regarding the rejected independent claims 1, 23, 33, 40, and 50, Applicant respectfully submits that neither Herskovitz nor Belanger disclose a heater to heat chocolate. More specifically, neither Herskovitz nor Belanger disclose a heater to heat chocolate to its melting point without burning.

Herskovitz discloses a heating element that heats thermoplastic material to a temperature exceeding the melting point of the various types of chocolate. Herskovitz's heating element would cause chocolate to burn. As stated in Herskovitz, "[a]n electric resistance heating element carried by the heater body provides sufficient heat to maintain the entire needle above 230 F at which the thermoplastic material will flow but below the temperature at which the material thermally decomposes." [Herskovitz, Abstract, lines 19-23]. Belanger similarly discloses a heating device that heats polyamide adhesives to a temperature exceeding the melting point of the various types of chocolate and would cause it to burn. As stated in Belanger, a "polyamide adhesive [] is heated to its normal application temperature of 350 F". [Belanger, Col. 3, lines 18-20].

Specifically, neither Herskovitz nor Belanger disclose a "heater to heat the chamber to a melting point of solid chocolate without burning" as recited in amended claim 1. [Claim 1 as amended, lines 6-7]. Neither Herskovitz nor Belanger disclose "heating the chamber with an electric heater to a temperature in a range of eighty-six to one-hundred and twenty degrees Fahrenheit to melt the chocolate therein into liquid chocolate without burning" as recited in amended claim 23. [Claim 23 as amended, lines 4-7]. Neither Herskovitz nor Belanger disclose "heating the



heat chamber with the heater to a temperature slightly above a melting point of solid chocolate to melt the chocolate into liquid chocolate without burning" as recited in amended claim 33. [Claim 33 as amended, lines 11-14]. Neither Herskovitz nor Belanger disclose a "heater to heat the heating chamber to a temperature above a melting point of solid chocolate to melt solid chocolate into liquid chocolate without burning" as recited in amended claim 40. [Claim 40 as amended, lines 7-9]. Neither Herskovitz nor Belanger disclose "a heater adjacent the chamber to heat solid chocolate of a solid state into liquid chocolate of a liquid state without burning" as recited in amended claim 55. [Claim 55 as amended, lines 6-8].

Regarding the rejected independent claims 1 and 55, Applicant respectfully submits that D'Agostino does not disclose a handle at the end of a plunger to manually apply pressure to chocolate. Specifically, D'Agostino does not disclose a "plunger includ[ing] a handle at a first end of a rod" "to manually apply pressure to chocolate" as recited in amended independent claim 1. [Claim 1 as amended, lines 14-15, and 18]. Nor does D'Agostino disclose "a plunger having a handle at a first end of a rod" "to manually apply pressure to liquid chocolate and dispense it from the chamber through the opening in the nozzle" as recited in amended independent claim 55. [Claim 55 as amended, lines 13 and 16-18].

Regarding the rejected independent claim 40, Applicant respectfully submits that D'Agostino does not disclose a second housing to slidingly couple to a plunger. Specifically, D'Agostino does not disclose "a second housing coupled to the first housing, the second housing slideningly coupled to the plunger to align the piston of the plunger with the heating chamber" as recited in amended independent claim 40. [Claim 40 as

amended, lines 20-22].

Regarding the rejected independent claim 23, Applicant respectfully submits that D'Agostino does not disclose what temperature any chamber needs heating to in order to melt D'Agostino's confections. That is, D'Agostino does not disclose "heating the chamber with an electric heater to a temperature in a range of eighty-six to one-hundred and twenty degrees Fahrenheit to melt the chocolate therein into liquid chocolate without burning" as recited in amended independent claim 23. [Claim 23 as amended, lines 4-7].

Regarding the rejected independent claims 33, 70, and 84, Applicant respectfully submits that neither Herskovitz nor Belanger, nor D'Agostino disclose a dispensing station to support a chocolate dispenser. That is, neither Herskovitz nor Belanger, nor D'Agostino disclose "positioning the portable chocolate dispenser in a support structure of a dispensing station over a dispensing area" as recited in amended independent claim 33. [Claim 33 as amended, lines 6-8]. Neither Herskovitz nor Belanger, nor D'Agostino disclose "a dispensing station to support the toy chocolate dispenser over a dispensing area of the dispensing station to dispense liquid chocolate therein" as recited in amended independent claim 70. [Claim 70 as amended, lines 10-13]. Neither Herskovitz nor Belanger, nor D'Agostino disclose "a support structure to hold the portable chocolate dispenser to dispense liquid chocolate in a dispensing area" as recited in amended independent claim 84. [Claim 84 as amended, lines 10-12].

For the foregoing reasons, Applicant respectfully submits that independent claims 1, 23, 33, 40, 55, 70, and 84 are not anticipated by any of Herskovitz, Belanger, or D'Agostino.

Rejected dependent claims 2-3, 6-16, 19, 20, and 22 depend directly or indirectly from independent claim 1. Rejected dependent claims 24-32 depend directly or indirectly from independent claim 23. Rejected dependent claims 34-39 depend directly or indirectly from independent claim 33. Rejected dependent claims 41-54 depend directly or indirectly from independent claim 40. Rejected dependent claims 71-83 depend directly or indirectly from independent claim 70. Rejected dependent claims 85-91 depend directly or indirectly from independent claim 84.

Applicant respectfully submits that independent claims 1, 23, 33, 40, 55, 70, and 84 are in condition for allowance over Herskovitz, Belanger, and D'Agostino such that dependent claims depending therefrom with further limitations are also in condition for allowance.

Applicant respectfully requests the withdrawal of the 35 USC 102(b) and (e) rejections of claims 1-3, 6-16, 19, 20, 22-55 and 70-91.

V) New Claims

Applicant has added new dependent claims 92-109.

New claims 92-94 depend directly from independent claim 1.

New claims 95-97 depend directly from independent claim 4.

New claims 98-100 depend directly from independent claim 5.

New claims 101-103 depend directly from independent claim 17.

New claims 104-106 depend directly from independent claim 18.

New claims 107-109 depend directly from independent claim 55.

Applicant respectfully submits that independent claims 1, 4-

5, 17-18, and 55 are in condition for allowance such that these new dependent claims 92-109 depending respectively therefrom with further limitations are also in condition for allowance.

#### VI) Claim Amendments

Applicant has amended claims 1, 4-7, 12-15, 17-21, 23, 25-30, 32-33, 35, 40, 44, 55-57, 63, 70, and 84-85 by this response.

As discussed above, dependent claims 4-5, 17-18, and 21 were amended into independent form as they were indicated as being allowable over the prior art.

As discussed above, dependent claims 12-15 and 19-20 were amended clarify how chocolate is being claimed and to correct an antecedent basis of "the handle" by correcting the dependency.

As discussed above, Applicant has amended independent claims 1, 23, 33, 40, and 55 to clarify Applicant's claimed invention.

Dependent claim 7 was amended to be consistent with the claim amendments made to independent claim 1 and to clarify that solid chocolate is being claimed as a part of the chocolate dispenser.

Dependent claim 24 was amended to be consistent with the claim amendments made to independent claim 23 and to clarify that the temperature of the chamber is to be heated to a temperature of substantially one-hundred and five degrees Fahrenheit.

Dependent claim 54 was amended to be consistent with the claim amendments made to independent claim 40.

Dependent claims 26-30 have been amended to be consistent with the claim amendments made to independent claim 23 and to correct the grammar therein.

Dependent claims 25, 35, and 44 have been amended to clarify

that the melting point of solid chocolate is a temperature in a range. The dependency of claims 35, 44 were also amended to be directly dependent from independent claims 33 and 40, respectively.

Dependent claim 43 had been amended to clarify that the heating chamber is heated to a temperature of substantially one-hundred and five degrees Fahrenheit by the heater.

Applicant has also amended independent claims 56, 63, 70, and 84. Independent claim 56 was amended to delete an instance of the word "a" which seemed to be grammatically incorrect in the claim. Independent claim 63 was amended to add the word --bladder-- after an instance of the word "flexible" in order to be consistent with the earlier usage of the phrase "flexible bladder" in the claim. An instance of the word "a" was also deleted from independent claim 62 which seemed to be grammatically incorrect in the claim. Independent claim 70 was to clarify to that the dispensing station supports the toy chocolate dispenser over a dispensing area. Independent claim 84 was amended to delete the word "and" which seems to be grammatically incorrect in the claim.

Dependent claim 57 was amended to correct an instance of the word "top" lacking antecedent basis to --first end-- having antecedent basis from independent claim 56.

Dependent claim 6 was amended to correct the past tense of the word "received" to the present tense --receive--.

Dependent claim 85 was amended to delete the word "of" which is grammatically incorrect in the claim.

These amendments to these claims were not made for reasons related to patentability.

VII) Specification Amendments

Applicant has amended the paragraph beginning on page 1, line 24 in order to correct a typographical error of "then" to --ten--.

Applicant has also amended the paragraph beginning on page 17, line 1 by correcting another typographical error by inserting a space between the word "and" and the reference number 100D.

**CONCLUSION**

In view of the foregoing it is respectfully submitted that the pending claims are in condition for allowance.

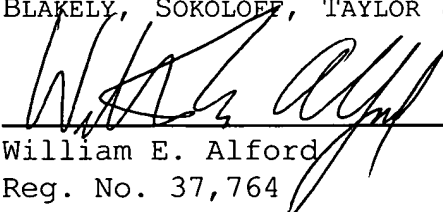
Reconsideration of the rejections and objections is requested. Allowance of the claims at an early date is solicited.

The Examiner is invited to contact Applicant's undersigned counsel by telephone at (714) 557-3800 to expedite the prosecution of this case should there be any unresolved matters remaining.

To the extent necessary, a petition for an extension of time under 37 C.F.R. 1.136 is hereby made. Please charge any shortage in fees in connection with the filing of this paper, including extension of time fees, to Deposit Account 02-2666 and please credit any excess fees to such deposit account.

Respectfully submitted,  
BLAKELY, SOKOLOFF, TAYLOR & ZAFMAN LLP

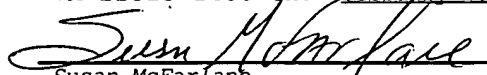
Dated: February 26, 2004

  
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